

Ex. B

Anderson, Barrett

From: Anderson, Barrett
Sent: Friday, September 27, 2024 7:13 AM
To: Sullivan, Luke; Ryan, Thomas; Gilchrist, Roy; tebuckley@debevoise.com; christina.cleveland@arnoldporter.com; Yoda, Kristine; john.holler@arnoldporter.com; Infinger, Tyler; Pitt, Jonathan; andrew.ellingsen@arnoldporter.com; nborn@debevoise.com; kenneth.hunter@dechert.com; kaitlyn.lindaman@stoel.com; sean.moore@stoel.com; mschaper@debevoise.com; srselden@debevoise.com; joshua.davis@arnoldporter.com; matthew.wolf@arnoldporter.com; jmfried@debevoise.com; msventim@debevoise.com; Perry, Mark; Obaro, Bambo; james.fishkin@dechert.com; Fuller, Deidre; Mainigi, Enu; Barrington, Luna; thassi@debevoise.com; Michael.B.Bernstein@arnoldporter.com; Podoll, A. Joshua; michael.kientzle@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; jason.ewart@arnoldporter.com; Yasmine Harik -contact; mike.cowie@dechert.com; jrabraham@debevoise.com; jacob.goldberg@stoel.com; john.casey@stoel.com; rachel.lee@stoel.com; allison.gardner@arnoldporter.com
Cc: Wint, Corene; Brenner, Nathan; Musser, Susan; Smith, Joshua; Dickinson, Charles; Willey, Kayla; Warren, Jacob; Pai, Rohan; Frech, Jacob; Hall, Laura; Ma, Rachel; Yoon, John; Ashmeade, Amare; 'ChristineCortez-contact'; 'NicoleGordon-contact'; 'CherylHiemstra-contact'; 'SamanthaFeeley-contact'; 'JeffHerrera-contact'; 'SchonetteWalker-contact'; 'WillMargrave-contact'; 'LucusTucker-contact'; 'AliceRiechers-contact'; 'ConnorNolan-contact'; 'PaulHarper-contct'; 'AngieMilligan-contact'; 'ChristopherKayser-contact'; 'ByronWarren-contact'; 'BrianYost-contact'; 'JaymeWeber-contact'; 'JuliaMeade-contact'; 'VinnyVenkat-contact'; 'TimNord-contact'; 'ShiraHoffman-contact'; 'RobertBernheim-contact'; 'GaryHonick-contact'; 'WilliamYoung-contact'; Wesneski, Josh; allison.gardner@arnoldporter.com
Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Luke:

Plaintiffs have not received a revised set of objections from Defendants and the briefing is due today. Any new objection made at this point would be untimely and unduly prejudicial.

Have Defendants dropped any of their objections, such that the parties may narrow the disputes before the Court? Please advise immediately.

Otherwise, Plaintiffs will file the two lists as contemplated by the Stipulation, one of undisputed exhibits and the second of disputed exhibits, with our 5-page brief later today.

Barrett

From: Anderson, Barrett
Sent: Thursday, September 26, 2024 11:23 AM
To: Sullivan, Luke <Luke.Sullivan@weil.com>; Ryan, Thomas <TRyan@wc.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>; tebuckley@debevoise.com; christina.cleveland@arnoldporter.com; Yoda, Kristine <Kristine.yoda@weil.com>; john.holler@arnoldporter.com; Infinger, Tyler <tinfinger@wc.com>; Pitt, Jonathan <JPitt@wc.com>; andrew.ellingsen@arnoldporter.com; nborn@debevoise.com; kenneth.hunter@dechert.com; kaitlyn.lindaman@stoel.com; sean.moore@stoel.com; mschaper@debevoise.com; srselden@debevoise.com; joshua.davis@arnoldporter.com; matthew.wolf@arnoldporter.com; jmfried@debevoise.com;

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Luke:

Plaintiffs are in the process of reviewing the objections we received a short while ago. In an effort to narrow the disputes before the Court, we will agree to remove from our post-hearing evidence list the documents below. Please note that this reduces the total number of post-hearing exhibits and transcripts on our list to only 122 in all.

Barrett

For removal:

1. DX2495
2. PX0006
3. PX0008
4. PX1154
5. PX1180
6. PX1227
7. PX12450
8. PX13044
9. PX1641
10. PX1890
11. PX2153
12. PX2199
13. PX3956
14. PX4055
15. PX4057
16. PX4058
17. PX4060
18. PX4066

- 19. PX4088
- 20. PX4094
- 21. PX4105
- 22. PX4135
- 23. PX4146
- 24. PX6632

From: Anderson, Barrett

Sent: Thursday, September 26, 2024 10:14 AM

To: Sullivan, Luke <Luke.Sullivan@weil.com>; Ryan, Thomas <TRyan@wc.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>; tebuckley@debevoise.com; christina.cleveland@arnoldporter.com; Yoda, Kristine <Kristine.yoda@weil.com>; john.holler@arnoldporter.com; Infinger, Tyler <tinfinger@wc.com>; Pitt, Jonathan <JPitt@wc.com>; andrew.ellingsen@arnoldporter.com; nborn@debevoise.com; kenneth.hunter@dechert.com; kaitlyn.lindaman@stoel.com; sean.moore@stoel.com; mschaper@debevoise.com; srselden@debevoise.com; joshua.davis@arnoldporter.com; matthew.wolf@arnoldporter.com; jmfried@debevoise.com; msventim@debevoise.com; Perry, Mark <Mark.Perry@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; james.fishkin@dechert.com; Fuller, Deidre <Deidre.Fuller@weil.com>; Mainigi, Enu <EMainigi@wc.com>; Barrington, Luna <Luna.Barrington@weil.com>; thassi@debevoise.com; Michael.B.Bernstein@arnoldporter.com; Podoll, A. Joshua <APodoll@wc.com>; michael.kientzle@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; jason.ewart@arnoldporter.com; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; mike.cowie@dechert.com; jrabraham@debevoise.com; jacob.goldberg@stoel.com; john.casey@stoel.com; rachel.lee@stoel.com; allison.gardner@arnoldporter.com

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Luke:

We are free at 3 PM Pacific. I'll send an invitation.

We note on first review that many of your objections are simply a sponsoring witness objection under another name. We are disappointed to see Defendants continuing to advance the same arguments despite having agreed not to do so as part of the parties' joint stipulation. We request that you withdraw those objections and allow the parties to focus on the actual remaining disputed issues, to converse our time and the Court's time.

Barrett

From: Sullivan, Luke <Luke.Sullivan@weil.com>

Sent: Thursday, September 26, 2024 10:05 AM

To: Anderson, Barrett <banderson1@ftc.gov>; Ryan, Thomas <TRyan@wc.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>; tebuckley@debevoise.com; christina.cleveland@arnoldporter.com; Yoda, Kristine <Kristine.yoda@weil.com>; john.holler@arnoldporter.com; Infinger, Tyler <tinfinger@wc.com>; Pitt, Jonathan <JPitt@wc.com>; andrew.ellingsen@arnoldporter.com; nborn@debevoise.com; kenneth.hunter@dechert.com; kaitlyn.lindaman@stoel.com; sean.moore@stoel.com; mschaper@debevoise.com; srselden@debevoise.com; joshua.davis@arnoldporter.com; matthew.wolf@arnoldporter.com; jmfried@debevoise.com; msventim@debevoise.com; Perry, Mark <Mark.Perry@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; james.fishkin@dechert.com; Fuller, Deidre <Deidre.Fuller@weil.com>; Mainigi, Enu <EMainigi@wc.com>; Barrington, Luna <Luna.Barrington@weil.com>; thassi@debevoise.com; Michael.B.Bernstein@arnoldporter.com; Podoll, A. Joshua <APodoll@wc.com>; michael.kientzle@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; jason.ewart@arnoldporter.com; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; mike.cowie@dechert.com; jrabraham@debevoise.com; jacob.goldberg@stoel.com; john.casey@stoel.com; rachel.lee@stoel.com; allison.gardner@arnoldporter.com

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Barrett –

Please find attached Defendants' objections to Plaintiffs' post-trial exhibits. Given the expedited timeframe, we are sending these now to enable the parties to meet and confer; however, Defendants' review remains ongoing, and we reserve the right to add, modify, or delete objections.

Please let us know when you are available to meet and confer.

Best,
Luke



Luke Sullivan

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From: Sullivan, Luke

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Barrett –

Defendants expect to circulate specific objections to the exhibits Plaintiffs identified around 9:00 AM PT, reserving the right to add, modify, or remove objections given the large number of exhibits identified and expedited timeframe. Please let us know when Plaintiffs will be available to confer.

Finally, so the record is clear, Defendants must briefly respond to your statement that “Defendants are unwilling to negotiate on this issue.” This is not correct. Defendants are identifying specific objections to the 146 exhibits identified on an expedited timeframe, responded to Plaintiffs’ question on the number of post-hearing exhibits Defendants anticipated, and are ready to meet and confer today. In contrast, it is Plaintiffs who continue to be both unreasonable and inflexible, and we note that you continue to refuse to provide any explanation as to why any post-hearing exhibits are warranted or provide a more tailored list.

Best,

Luke



Luke Sullivan

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Luke:

As you might expect, Plaintiffs cannot agree to only submit 44 post-hearing exhibits, for the reasons we explained before. We should also note that the court in *Novant* did not place a cap on the number of post-hearing exhibits; rather,

the court admitted documents actually cited in the parties' proposed findings of fact. Regardless, we understand that Defendants are unwilling to negotiate on this issue.

Could you provide a time estimate of when you will send the objections? That will inform when we are able to review them and meaningfully meet and confer this afternoon.

Barrett

From: Sullivan, Luke <Luke.Sullivan@weil.com>

Sent: Thursday, September 26, 2024 6:00 AM

To: Anderson, Barrett <banderson1@ftc.gov>; Ryan, Thomas <TRyan@wc.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>; tebuckley@debevoise.com; christina.cleveland@arnoldporter.com; Yoda, Kristine <Kristine.yoda@weil.com>; john.holler@arnoldporter.com; Infinger, Tyler <tinfinger@wc.com>; Pitt, Jonathan <JPitt@wc.com>; andrew.ellingsen@arnoldporter.com; nborn@debevoise.com; kenneth.hunter@dechert.com; kaitlyn.lindaman@stoel.com; sean.moore@stoel.com; mschaper@debevoise.com; srselden@debevoise.com; joshua.davis@arnoldporter.com; matthew.wolf@arnoldporter.com; jmfried@debevoise.com; msventim@debevoise.com; Perry, Mark <Mark.Perry@weil.com>; Obaro, Bambo <Bambo.Obaro@weil.com>; james.fishkin@dechert.com; Fuller, Deidre <Deidre.Fuller@weil.com>; Mainigi, Enu <EMainigi@wc.com>; Barrington, Luna <Luna.Barrington@weil.com>; thassi@debevoise.com; Michael.B.Bernstein@arnoldporter.com; Podoll, A. Joshua <APodoll@wc.com>; michael.kientzle@arnoldporter.com; sonia.pfaffenroth@arnoldporter.com; jason.ewart@arnoldporter.com; Yasmine Harik -contact <yasmine.harik@arnoldporter.com>; mike.cowie@dechert.com; jbrahim@debevoise.com; jacob.goldberg@stoel.com; john.casey@stoel.com; rachel.lee@stoel.com; allison.gardner@arnoldporter.com

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Barrett –

Thank you. We will be sending our objections later this morning, and we suggest scheduling a time to meet and confer in the afternoon to discuss these issues.

Before then, here are brief responses to your two main questions.

First, you ask Defendants to “propose a number” of post-hearing exhibits that would “resolve your ‘numbers’ objection here.” Our position is that 146 is patently unreasonable. Plaintiffs have not identified the need for any additional exhibits, let alone more than they chose to introduce at the entire trial. We agreed before trial that the parties could, if necessary, seek leave to add a reasonable number of additional exhibits. As we

explained at the time, we had the Novant figure in mind as the very outermost limit, and expected far fewer if any.

Second, you raise extending the deadline to file objections and 5-page briefs with the Court, to provide the parties more time to meet and confer. Given the Court's commitment to issuing an expeditious decision, however, it is important to promptly brief, and alert the Court to, Defendants' objections to the 146 exhibits Plaintiffs intend to cite in their post-hearing findings of fact that have not yet been admitted into evidence. Defendants are working to expeditiously provide objections to ensure the parties can confer, but further delaying briefing of this issue is not workable given the time constraints in this action. Plaintiffs state that they are concerned about allowing "sufficient time for the parties to engage in a fulsome meet-and-confer process." But any time pressure on meeting and conferring is due to Plaintiffs' overbroad post-hearing exhibit disclosure and refusal to narrow it.

Please let us know what times you are available to confer.

Best,
Luke



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Sent: Wednesday, September 25, 2024 7:01 PM

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Luke:

Thank you for agreeing to provide specific objections. Below my signature block is a list showing the specific pages and lines of the investigational hearing and deposition transcript segments we will be citing in our Findings of Fact. Please direct your review of those exhibits to those sections.

While we believe that 146 documents is a reasonable number, as we stated in my prior email, we note that Defendants have not stated what number of post-hearing evidence they think would be “reasonable,” other than observing that the *Novant* case allowed 44 exhibits. Could you propose a number to which Defendants would agree that would resolve your “numbers” objection here? For example, if the parties agree that Plaintiffs may offer 100 exhibits, would Defendants agree that is a “reasonable” number so that we can narrow the disputes before the Court? We cannot promise that we’d agree with your number, but we are willing to consider what you have in mind.

We also continue to believe that other objections may be resolved during the meet-and-confer process, and we are confident you would agree that the Court would appreciate the parties making a good-faith effort to resolve any objections prior to asking the Court to do so. However, given the current very condensed schedule for discussing post-hearing evidence, we are concerned there will not be sufficient time for the parties to engage in a fulsome meet-and-confer process before we file our proposed Findings of Fact. That is why we have suggested the extension.

To be clear, we are fine with the parties still filing the two lists of post-hearing evidence (undisputed and disputed) with the Findings of Fact, as contemplated by the stipulation, which we agree the “disputed” list will also include Defendants’ objections. Those objections will thus be before the Court and preserved. Our extension proposal merely contemplates filing a joint stipulation explaining that the parties are working through those objections and will file their 5-page briefs in the coming week. We would note that this approach has the added benefit of allowing Defendants to first review our proposed Findings of Fact and see the purpose for and context in which Plaintiffs are citing the post-hearing evidence. That additional context will surely make our discussions more productive, and perhaps eliminate some of your concerns, than speaking in a relative vacuum.

Sincerely,
Barrett

Transcript cites:

- PX4091 (Cahan (Trader Joe’s) Dep. 99:23-100:19, 101:13-102:7, 111:6-112:18, 113:20-114:20, 117:21-124:3)
- PX4144 (Kerr (Lidl) Dep. 91:5-92:20, 97:3-98:5, 100:8-11, 105:10-15, 110:6-111:5, 125:6-126:3, 133:12-18; 145:16-146:16)
- PX4136 (Sitter (Aldi) Dep. 24:10-22, 25:16-26:10, 31:8-16, 32:2-5, 109:23-110:5, 111:5-113:24, 119:18-121:1, 130:8-132:6)
- PX4062 (Leary (BJ’s) Dep. 73:25-74:13, 129:22-131:5)
- PX4116 (Snow (Dollar General) Dep. 80:16-82:6, 94:18-95:8, 97:18-98:10, 98:12-21)
- PX4135 (Grisham (Sam’s Club) Dep. 46:7-16)
- PX4058 (Garnes (Kroger) Dep. 105:15-106:1)
- PX4088 (Stewart (Kroger) Dep. 34:21-35:2)

- PX4111 (Pollnow (DoorDash) Dep. 111:13-113:2, 124:12-21, 132:18-133:12, 134:13-135:6, 136:17-137:17)
- PX4066 (Clougher (Albertsons) Dep. 68:13-21)
- PX4146 (Withers (Albertsons) Dep. 134:20-135:5)
- PX4055 (Larson (Albertsons) Dep. 140:13-142:3, 142:22-143:4, 151:6-22, 157:11-23)
- PX4112 (Cordova (UFCW Local 7) Dep. at 46:7-24, 128:4-130:11, 189:2-191:9)
- PX4134 (Frazier (UFCW Local 1564) Dep. 15:23-16:6)
- PX4132 (Guenther (UFCW Local 3000) Dep. 86:5-7, 122:4-124:13)
- PX4101 (Davison (SoftBank) Dep. 49:10-50:21, 61:13-62:2)
- PX4030 (Winn (C&S) IH 136:18-137:8)
- PX4029 (Millerchip (Kroger) Dec. 23, 2023 IH 64:21-67:19, 69:11-24)
- PX4060 (Winn (C&S) June 4, 2024 Dep. 254:2-256:7)
- PX4094 (Cossett (Kroger) June 10, 2024 Dep. 156:8-17)
- PX4105 (Cossett (Kroger) June 11, 2024 Dep. 379:14-21)
- PX4057 (Lingineni (C&S) Dep. at 53:15-24, 77:8-19)

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Sent: Wednesday, September 25, 2024 1:43 PM

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Barrett –

Thank you for your email. Defendants disagree with Plaintiffs' arguments, as we will explain more fully in the upcoming briefing. For now, suffice it to say that it is unreasonable for Plaintiffs to attempt to admit into evidence after trial more exhibits than Plaintiffs admitted during trial. The Court carved three weeks out of its calendar to permit the parties to present evidence to the fact-finder. Plaintiffs had ample time to do so and move to admit whatever evidence it wished, subject to contemporaneous objections and cross-examination. Dumping in well over 100 documents—including full deposition transcripts—after trial, without any of the safeguards at trial such as evidentiary objections and cross examination, is unreasonable, unprecedented, and fundamentally unfair to Defendants.

Plaintiffs attempt to justify their overbroad list of post-trial exhibits based on the parties' stipulation, stating that "[w]ithout Defendants' agreement to the post-hearing evidence stipulation, Plaintiffs would have structured our case differently to gain admission of these documents." This fundamentally mischaracterizes the stipulation. The stipulation clearly and unambiguously states that the "Parties shall retain *all rights to object to the admission of any Post-Hearing Exhibits*." Dkt. 421. The stipulation also permits a party only "*to seek to offer into evidence any Post-Hearing Exhibits*"—it does not automatically permit the admission of any exhibit. *Id.* And while we told you on August 29 that we will not object to the admission of post-trial exhibits solely on the ground that there is no sponsoring witness, we specifically told you in that same email that we reserved the right to object to the admissibility of post-trial exhibits on any other grounds, including that a document lacks context, probative value, and is unduly prejudicial and misleading because—among other things—it could have been but was not shown to a witness. *See* L. Sullivan Email, 8/29/24. Thus, to the extent Plaintiffs made the strategic choice to not move to admit evidence at the hearing, Plaintiffs were on notice that Defendants may object to the admission of that evidence as a post-hearing exhibit on any ground. Plaintiffs' strategic choices cannot justify the wholesale admission of documents lacking any foundation or context.

Defendants are disappointed that Plaintiffs are refusing to narrow their overbroad post-trial exhibit list. Nevertheless, Defendants plan to identify specific objections to each exhibit, consistent with the stipulation. Defendants will aim to send a list of those objections tomorrow morning and will be available to confer thereafter. Defendants see no reason to adjust the current briefing deadlines on this issue; to the contrary, Defendants' objections should be filed contemporaneously with the post-trial findings of fact, so the Court understands that Plaintiffs' proposed findings of fact rely on over 100 exhibits that have not yet been admitted into evidence.

Best,
Luke



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From: Anderson, Barrett <banderson1@ftc.gov>

Sent: Wednesday, September 25, 2024 1:04 PM

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Luke:

Plaintiffs will not be narrowing our post-hearing exhibit list. The total number of documents on the list is only 146. Defendants do not suggest that they are incapable of reviewing or identifying objections to that relatively small number of documents. And if you require more time to do so, that's fine, and we've already proposed an extension for that purpose—all you need to do is agree to it. The number of post-hearing documents is thus "reasonable" as per the parties' agreement.

We disagree that the word "reasonable" in the parties' stipulation should be measured against the number of exhibits offered at the evidentiary hearing. Defendants never proposed that the word "reasonable" should be construed in that manner, and Plaintiffs would never have agreed to it. Rather, as you recall, Defendants proposed a limit of 50 exhibits, and Plaintiffs declined that proposal because—as we explained to you then—setting an arbitrary number of exhibits did not make sense when the actual number would depend on what happened at the hearing and on what the parties believed would be necessary to support their post-hearing Findings of Fact. Just so here.

Defendants' suggestion that the number of post-hearing exhibits is not reasonable simply because it slightly exceeds the number of exhibits admitted at the hearing is inapt for another reason: as you recall, Plaintiffs negotiated the post-hearing evidence stipulation precisely because it would save the Court's and the parties' time and resources by allowing Plaintiffs to avoid the need to call witnesses to sponsor these post-trial exhibits at the hearing. Without Defendants' agreement to the post-hearing evidence stipulation, Plaintiffs would have structured our case differently to gain admission of these documents. Defendants cannot now complain about the number when the parties have explicitly agreed to permit this post-hearing evidence process.

The limited number of documents on our post-hearing evidence list is also reasonable because it comports with Defendants' arguments in their pre-hearing briefing on the scope of the record, where you asserted that the 3,726 exhibits on Complaint Counsel's Part 3 exhibit list was "improper and impractical." Of course, 146 is far fewer than 3,726; in fact, 146 is less than 4% of the full Part 3 exhibit list. It is also far fewer than (also less than 4% of) the 3,693 exhibits on Plaintiffs' combined exhibit lists in the federal proceeding—all of which have been disclosed to Defendants, most for many weeks now. And it is far, far, far fewer than the *tens of millions* of documents produced in the investigation and litigation overall. Defendants' current allegation that a paltry 146 documents is somehow *still* too many beggars belief.

Your attempt to compare the number directly to the exhibits admitted post-hearing in *Novant* is inapt. A \$500 million local hospital merger case is plainly smaller in scale than a \$26 billion national grocery business merger. The number of documents reflects that difference; as you may be aware, Plaintiffs disclosed only 722 exhibits on their combined exhibit lists in the *Novant* case, compared to the 3,693 in this case. And the respective administrative records also greatly differed; the number of documents produced overall in the investigation and litigation in this case exceeds the *Novant* case by several orders of magnitude. Given that additional context, your suggestion that Plaintiffs in this case may only offer a similar number of post-hearing exhibits as in *Novant* is a nonstarter.

Do Defendants intend to identify any specific objections to any of the listed post-hearing exhibits? If so, please let us know if we may expect those objections **by noon Pacific today**. If you require more time, let us know by that time. As we stated before, we believe there can be few, if any, meritorious objections to the post-hearing exhibits, especially given that the vast majority are documents produced by the Defendants in this case. We also believe that any disputes over these documents can be resolved or substantially narrowed during the meet-and-confer process. But it will be necessary for Defendants to identify those objections first. And, contrary to your statement, Plaintiffs are unaware of any authority obligating us to "identify the specific basis for moving to admit" any post-hearing exhibit into evidence, and there can certainly be no such obligation until and unless Defendants identify specific objections.

After the parties have resolved or narrowed the list of disputed post-hearing evidence, and the parties can agree on a reduced list of remaining disputed exhibits, Plaintiffs will consider how best to identify those limited exhibits for the Court in our Findings of Fact. And, while we do not believe we are obligated to provide the page and line numbers of the cites in the investigational hearing and deposition transcripts we have listed, we are willing to consider doing so if Defendants confirm that you intend to engage with us on specific objections to documents.

Sincerely,
Barrett

Barrett Anderson
Senior Trial Counsel
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From: Sullivan, Luke <Luke.Sullivan@weil.com>

Sent: Tuesday, September 24, 2024 7:40 PM

To: Anderson, Barrett <banderson1@ftc.gov>; Ryan, Thomas <TRyan@wc.com>; Gilchrist, Roy <Roy.Gilchrist@weil.com>; tebuckley@debevoise.com; christina.cleveland@arnoldporter.com; Yoda, Kristine <Kristine.yoda@weil.com>; john.holler@arnoldporter.com; Infinger, Tyler <tinfinger@wc.com>; Pitt, Jonathan <JPitt@wc.com>; andrew.ellingsen@arnoldporter.com; nborn@debevoise.com; kenneth.hunter@dechert.com;

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Counsel –

Defendants are in receipt of Plaintiffs’ “list of post-hearing evidence we intend to submit with our findings of fact.”

The parties’ stipulation permits each party to “seek to offer into evidence a **reasonable number of exhibits** in support of that Party’s proposed findings of fact,” which were not admitted into evidence during the trial. *See* Dkt. 421.

Despite this language and Plaintiffs’ assurance just earlier today that their list “will be a reasonable number of documents,” Plaintiffs have disclosed **126 exhibits** they intend to seek to admit into evidence. But Plaintiffs admitted only **111 exhibits** into evidence during trial. Thus, Plaintiffs are seeking to admit after trial more exhibits than they moved into evidence during the entire trial. This is unreasonable and inconsistent with the stipulation. Indeed, the 126 exhibits Plaintiffs identified vastly exceeds the 44 post-trial exhibits admitted in the Novant matter.

By 9:00 AM ET tomorrow, please either (a) serve a revised list that is substantially more tailored, or (b) identify the specific basis for moving to admit each of the 126 new exhibits into evidence.

Additionally, it appears the FTC has included deposition and investigational hearing transcripts on its list. Please immediately (and by 9:00 AM ET tomorrow) identify the specific portions of those transcripts that Plaintiffs intend to move to admit into evidence—Defendants cannot evaluate the transcript without knowing the portion Plaintiffs intend to introduce.

Finally, given that the briefing on the admission of these documents will be served simultaneously with the post-trial findings of fact, please confirm the FTC will identify for the Court in its motion which exhibits were

not admitted into evidence at trial and are the subject of post-trial briefing. Defendants request that Plaintiffs highlight those exhibits in yellow. In the event the Court denies admission of these exhibits, there must be a clear record on what exhibits have in fact been admitted into evidence.

Best,
Luke



Luke Sullivan

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Luke:

Attached is Plaintiffs' current list of post-hearing evidence we intend to submit with our findings of fact. This list does not include any exhibits already admitted into evidence at the hearing.

Please let us know immediately if you will be able to provide objections by noon tomorrow or if you will need more time.

Sincerely,
Barrett

From: Sullivan, Luke <Luke.Sullivan@weil.com>

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Barrett –

Thank you. Given your statement that Plaintiffs' list "will be a reasonable number of documents that will be subject to few (if any) objections," Defendants propose that we exchange exhibit lists at 5:00 PM PT tonight. If it appears that an adjustment to the schedule is needed due to the number of exhibits disclosed, we will raise that with the Plaintiffs as soon as possible.

Best,

Luke



Luke Sullivan

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Luke:

On the first point, we're fine with Pacific times instead of Eastern.

On the second point, while we believe our list will be a reasonable number of documents that will be subject to few (if any) objections, we are obviously not well positioned to know how much time you'll need to identify objections. If you

do require additional time for your objections, that will of course necessarily push back the meet and confer, and substantially reduce the time to prepare briefing related to those objections. In that case, the parties will likely need to request a few-day extension of the deadline for the 5-page briefs.

For that reason, we would propose the following:

- The parties exchange their lists of post-hearing evidence today by 5 PM Pacific, as planned.
- If Defendants require additional time to identify your objections, you will inform us by 10 PM Pacific tonight.
- In that situation, the parties agree to submit an amended stipulation to the Court stating we are meeting and conferring on post-hearing evidence but require additional time to adequately narrow and brief the disputes, and thus request the deadline for the 5-page admissibility briefs be extended to Wednesday of next week (Oct. 2).

If that is acceptable, please let us know.

Barrett

From: Sullivan, Luke <Luke.Sullivan@weil.com>

Sent: Tuesday, September 24, 2024 9:56 AM

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Counsel –

Thank you. We likely can agree to this process, subject to two points.

First, the times should be changed to PT, not ET, given that this case is in Oregon.

Second, Defendants can agree to this schedule—particularly the requirement to identify objections to exhibits in less than 24 hours—only if Plaintiffs seek to admit a reasonably small number of exhibits; otherwise, Defendants will need more time to lodge objections.

Please let us know if Plaintiffs agree on those two points.

Best,
Luke



Luke Sullivan

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Subject: RE: 3:24-cv-00347: Federal Trade Commission, et al. v. The Kroger Company, et al. - Post-Hearing Evidence

Counsel:

Just following up on my email below. Does this plan work for you?

Thank you,
Barrett

From: Anderson, Barrett

Sent: Monday, September 23, 2024 10:40 AM

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Counsel:

We write pursuant to the Post-Hearing Evidence Stipulation and Order, under which (as you know) the parties agreed to a process to exchange exhibits they intend to submit in support of their findings of fact ("Post-Hearing Evidence") and discuss any objections thereto. Because the order allows only three days for this process before the September 27 filing deadline, we propose the following schedule to ensure the parties have sufficient time to address and attempt to resolve any such objections in advance:

- September 24 – The parties exchange lists of Post-Hearing Evidence in Excel spreadsheet format no later than 5 PM Eastern
- September 25 –

- The parties exchange any objections to the opposing parties' Post-Hearing Evidence in the same Excel spreadsheet format no later than noon Eastern
- The parties meet and confer between 3-6 PM Eastern regarding those objections

Please let us know if this schedule works for you and, if so, what time on September 25 you are available for the meet and confer.

Sincerely,
Barrett

Barrett Anderson
Senior Trial Counsel
Federal Trade Commission | Bureau of Competition
202-460-0766
banderson1@ftc.gov
Pronouns: he, him, his

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